

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CONNIE A. WATTS)	
Claimant)	
VS.)	
)	Docket No. 1,022,033
USD 259)	
Self-Insured Respondent)	

ORDER

Respondent appealed the May 16, 2007, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on August 22, 2007.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she initially injured her right knee on June 22, 2004, when she slipped and fell while working for respondent as a custodian. She also alleges she later developed right hip and low back problems as a natural consequence of the right knee injury.

Claimant initiated this claim alleging a period of accident from June 22, 2004, and continuing each and every workday thereafter. The parties, however, represented at oral argument before the Board that claimant last worked for respondent on or about September 20, 2005. Consequently, that date would end the period of claimant's alleged repetitive trauma. The parties do not challenge the Judge's finding that June 22, 2004, is the appropriate date of accident for claimant's alleged injuries.

In the May 16, 2007, Award, Judge Clark determined claimant initially injured her right knee working for respondent and subsequently developed right hip and low back problems as a natural consequence of the knee injury. Accordingly, the Judge awarded claimant permanent disability benefits for an unscheduled injury under K.S.A. 44-510e. Judge Clark also ruled claimant sustained a 100 percent wage loss and an 82 percent task loss, which combined for a 91 percent work disability (a permanent partial general disability greater than the functional impairment rating) and an award of \$100,000 for temporary total and permanent disability benefits.

Respondent contends Judge Clark erred. It argues claimant only sustained an injury to her right leg and, therefore, claimant's permanent disability benefits should be determined under the schedule of K.S.A. 44-510d. Respondent also argues the Board should adopt the 20 percent lower extremity rating that was provided by Dr. Terrence Pratt, whom the Judge selected to perform an independent medical evaluation. In addition, respondent argues the Board should disregard the rating opinions of claimant's medical expert, Dr. Pedro A. Murati, because most of Dr. Murati's work is on behalf of claimants for which he receives over a half million dollars a year. In short, respondent requests the Board to reduce claimant's award from \$100,000 to \$11,657.36.

Claimant argues she is permanently and totally disabled from working and, therefore, she should receive permanent total disability benefits or an award for \$125,000. In the alternative, claimant argues the injuries to her right hip and low back remove her injuries from those listed in the schedule of K.S.A. 44-510d and, therefore, she should receive permanent disability benefits under K.S.A. 44-510e. In that respect, she argues she has a 91 percent permanent partial disability under K.S.A. 44-510e for a 100 percent wage loss and an 82 percent task loss. Regarding Dr. Pratt, claimant argues the doctor evaluated her right leg but ignored her right hip and back as those problems arose after the June 22, 2004, accident. With respect to her reflex sympathetic dystrophy, claimant argues Dr. Pratt improperly converted a whole person impairment rating to a right leg rating and, therefore, the Board should disregard the ratings he provided.

The issues before the Board on this appeal are:

1. Should claimant receive permanent disability benefits for a right leg injury only under the schedule of K.S.A. 44-510d, permanent disability benefits for an unscheduled injury under K.S.A. 44-510e, or permanent total disability benefits under K.S.A. 44-510c?
2. If claimant is not permanently and totally disabled, what is claimant's permanent partial disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. Claimant began working for the respondent school district in 1997 as a custodian. On June 22, 2004, claimant injured her right knee at work when she slipped and struck her right knee on a tile floor. Respondent admitted that accident arose out of and in the course of claimant's employment with the school district.
2. Following the June 22, 2004, accident, respondent promptly referred claimant for medical treatment, which began with Dr. Merrill Thomas. The doctor applied a full brace on claimant's right leg, gave her crutches, and sent her back to work. Under Dr. Thomas' treatment, claimant underwent an MRI, which revealed a contusion of the anterior tibia with focal edema and degenerative changes in the lateral compartment of the patellofemoral joint. In early September 2004, claimant reported to Dr. Thomas she was experiencing right hip and low back pain after moving a lunch table at work. The doctor prescribed physical therapy for claimant's low back, right hip, and leg pain. Despite that treatment, claimant's symptoms did not abate.
3. In late August 2004, claimant began treating with orthopedic surgeon Dr. Pat Do. Dr. Do diagnosed a meniscus tear in the right knee and in September 2004 the doctor performed arthroscopic surgery, which included a partial medial meniscectomy, chondroplasty of the patella, and plica resection. Following that knee surgery, claimant was off work for approximately six weeks before returning to work on light duty. Unfortunately, the right knee surgery did not end claimant's symptoms and shortly afterwards the doctor diagnosed reflex sympathetic dystrophy.
4. Dr. Do referred claimant to Dr. Jon Parks for pain management. Consequently, Dr. Parks began treating claimant's reflex sympathetic dystrophy, also known as complex regional pain syndrome. When medications and a sympathetic nerve block did not resolve claimant's symptoms, Dr. Parks recommended a spinal cord stimulator. When she testified at the December 2006 regular hearing, claimant had not decided if she would proceed with the stimulator.
5. Dr. Parks, however, referred claimant to Dr. George Fluter for treatment. But when respondent did not approve that referral, claimant's attorney sent her to Dr. Pedro A. Murati, who administered a series of right knee injections. About this same time, claimant also saw a Dr. Schurman, who is an orthopedic surgeon and who determined a total knee replacement was not necessary.

6. Claimant's symptoms are not restricted to her right leg. As indicated above, by September 2004 claimant was reporting to her treating doctor that she was experiencing pain in her right hip and low back. At the December 2006 regular hearing, claimant testified she was unable to walk more than a short distance or stand for any length of time because of right knee pain that goes into the right hip and low back. Claimant also testified she must sit or lie down and prop her leg up about four times per day for approximately an hour and a half to relieve that pain. At night claimant's pain awakens her about every three hours and limits her sleep to only four to six hours each night. Claimant is unable to drive more than a short distance and during the day she constantly wears a right knee brace. In addition, claimant discovered she was allergic to some of the narcotic pain medications that she was prescribed. Consequently, at the time of regular hearing, the only medication she was taking was Aleve.
7. The parties represented that claimant left her employment with respondent on approximately September 20, 2005. In late March 2006 she was terminated. Accordingly, the parties entered a written stipulation that claimant's health and life insurance were terminated by respondent on March 31, 2006. Consequently, claimant's average weekly wage for purposes of this award was \$459.07 for the period from June 22, 2004, through March 31, 2006, when her health and life insurance benefits stopped and the average weekly wage increased to \$577.83.
8. Since her termination, claimant has conducted a very limited job search. She has sent resumes to five other potential employers seeking janitorial work, but she has not looked for work elsewhere. At the time of regular hearing, claimant's source of income was KPERS (Kansas Public Employees Retirement System) disability and \$412 per month in Social Security disability benefits.
9. At Judge Clark's request, Dr. Terrence Pratt evaluated claimant for purposes of this claim. The doctor, who is board-certified in physical medicine and rehabilitation, examined claimant in early October 2006 and diagnosed claimant as follows:

Her diagnoses in relationship to the June 22, 2004 event with right knee discomfort, history of chondromalacia patella, and medial meniscus tear, status post partial medial meniscectomy, and chondroplasty of medial facet of the patella. She also has a reported history of a complex regional pain syndrome with involvement of the right lower extremity.¹

¹ Pratt Depo., Ex. 3 at 1.

According to Dr. Pratt, complex regional pain syndrome affects the sympathetic nervous system and the part of that system that is affected in claimant originates in the thoracolumbar region. Using the AMA *Guides*², the doctor measured claimant's right leg impairment at 20 percent. In determining that rating, the doctor used a table from the *Guides* that pertains to the spinal cord as that book does not specifically address complex regional pain syndrome. That table, however, provided a rating for the whole person impairment and did not provide a rating for an extremity.

10. Dr. Pratt found claimant's condition consistent with her complaints about experiencing pain from the water during a shower and from bed sheets touching her leg. Dr. Pratt also found tenderness in claimant's low back over the right gluteal region and reduced range of motion in her low back. Moreover, the doctor testified claimant's gait disturbance involved her right hip. *The doctor, however, did not rate claimant's lower back as he understood his limited mission was to rate claimant for the injuries she sustained on June 22, 2004, which only involved the right knee.* The doctor testified, in part:

Q. (Mr. Seiwert) Doctor, you said something in answer to Mr. Martin's last question, you said "for that injury date." Is that correct?

A. (Dr. Pratt) That's correct.

Q. If you leave aside and take that phrase out of it, did she have other conditions that were rateable?

A. Well, I was asked to see her for date of injury of June 22, 2004. But in the records subsequent to that date, there was an event for which she was treated for involving her low back. I think she was pushing a table or something like that.

Q. And was that a condition that was rateable?

A. Potentially.³

11. Dr. Pratt concluded claimant should avoid prolonged standing and walking, unlevel surfaces, kneeling, or crawling. In addition, the doctor believed she should not perform activities that require lifting more than 30 pounds or either pushing or

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Pratt Depo. at 7.

pulling more than 40 pounds. *Moreover, Dr. Pratt was not asked about claimant's loss of ability to perform her former job tasks nor was he asked about her ability to engage in substantial or gainful employment.*

12. Dr. Murati was the only other doctor to testify about claimant's permanent impairment. As indicated above, Dr. Murati began treating claimant when respondent did not approve Dr. Parks' referral to Dr. Flutter. In addition to finding reflex sympathetic dystrophy, Dr. Murati also found claimant had low back and right hip symptoms from the abnormal gait she developed due to the right knee injury. The doctor last examined claimant in June 2006 and diagnosed patellofemoral syndrome in the right knee, low back pain, trochanteric bursitis in the right hip, and right sacroiliac dysfunction, all of which the doctor related to claimant's June 2004 work injury. Using the *AMA Guides*, Dr. Murati rated claimant as having a five percent whole person impairment for the patellofemoral syndrome and trochanteric bursitis, and a five percent whole person impairment for lumbar strain, all of which combined for a 10 percent whole person functional impairment. The doctor did not rate claimant's reflex sympathetic dystrophy. He explained, as follows:

On the last day I saw her it was a good day. . . . So much so that you see I didn't rate her for reflex sympathetic dystrophy. I rated her for the conditions arising from that problem. That does not mean that she does not deserve a rating for reflex sympathetic dystrophy. For example, if this patient came back to me on a bad day and I saw her leg flared up, then I could give her -- I would say, yes, she deserves an RSD impairment, which would be in addition to the one I provided. And, again, the *Guides* don't give you a lot of help when it comes to rating these people because their pain is just incredible.⁴

13. Based upon his evaluation, Dr. Murati concluded claimant should avoid ladders, squatting, crawling, kneeling, repetitive right foot controls, climbing stairs more than rarely, standing or walking more than occasionally, and lifting below knuckle height. Likewise, the doctor would restrict claimant from lifting/carrying/pushing/pulling 10 pounds more than occasionally and more than five pounds frequently. In short, Dr. Murati determined claimant needed a job that would permit her to sit. But on days claimant's reflex sympathetic dystrophy would flare, the doctor indicated it would be difficult for her to sit due to the pain. Dr. Murati explained how claimant would have days when she could not work, as follows:

Since this lady can't walk very well, she's going to have trouble, so -- on a good day she's going to have trouble; on a bad day, she won't

⁴ Murati Depo. at 16.

show up to work. That's the problem with these patients with reflex sympathetic dystrophy, you know, they have good days; they have bad days. When they have bad days, they are really bad. I mean, I caught her on a good day.⁵

Although Dr. Murati did not believe claimant needed a spinal cord stimulator when he last saw her in June 2006, he was definite she needed some sort of pain management.

14. Claimant's attorney hired vocational rehabilitation expert Doug Lindahl to review claimant's work history and to create a list of the tasks claimant performed in the 15 years before her June 2004 accident. After reviewing that list, Dr. Murati concluded claimant should not perform nine of the 11 tasks, or approximately 82 percent, as a result of her work-related injuries. That task loss opinion is uncontradicted
15. Mr. Lindahl also analyzed claimant's post-injury ability to earn wages in light of her recommended work restrictions. Mr. Lindahl concluded claimant retained the ability to work as either a dispatcher or a senior customer service representative. The former job would pay \$5.25 per hour and the latter would pay \$5.40 per hour. Mr. Lindahl felt those wages were representative of claimant's present abilities.
16. At the time of the December 2006 regular hearing, claimant was 52 years old and had completed the eighth grade. Claimant has not worked for any employer since her termination by respondent, where she worked for approximately eight years.

CONCLUSIONS OF LAW

Claimant has failed to prove she is permanently and totally disabled or otherwise entitled to receive permanent total disability benefits under K.S.A. 44-510c. Neither Dr. Pratt nor Dr. Murati indicated claimant was unable to work. Moreover, claimant's vocational expert, Mr. Lindahl, found that claimant retained the ability to earn between \$5.25 and \$5.40 per hour, which would create a weekly wage between \$210 and \$216 for a 40-hour workweek.

Claimant, however, is entitled to receive permanent partial disability benefits under K.S.A. 44-510e. Injuries that are listed in the schedule of K.S.A. 44-510d are compensated under the provisions of that statute. If a worker's injury does not fall within that schedule, K.S.A. 44-510e applies. The Board affirms the Judge's finding that claimant developed permanent functional impairment from continuing back, right leg, and right hip problems

⁵ *Id.* at 14.

as a natural result of her June 22, 2004, accident. Consequently, K.S.A. 44-510e governs claimant's permanent partial disability benefits. And that statute provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁶ and *Copeland*.⁷ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.⁸

⁶ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁷ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁸ An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh'g denied (2007) and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁹

The Kansas Court of Appeals in *Watson*¹⁰ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.¹¹

When the record closed, claimant was not working and, therefore, she had an actual 100 percent wage loss. But claimant has failed to prove she has made a good faith effort to find appropriate employment. Consequently, for the period following her departure from respondent's employ, the Board must impute a post-injury wage for purposes of the permanent partial general disability formula. And the only evidence regarding claimant's retained ability to earn wages was from Mr. Lindahl, who indicated claimant could earn between \$5.25 and \$5.40 per hour, or between \$210 and \$216 per week. The Board finds claimant retains the ability to earn \$216 per week.

As noted above, claimant continued working for respondent (presumably at a comparable wage) through September 20, 2005. Consequently, for those weeks claimant did not receive temporary total disability benefits during the period from June 22, 2004, through September 20, 2005, claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e based upon her 10 percent whole person functional impairment.

For purposes of the permanent partial general disability formula, claimant has a 53 percent wage loss (\$216 per week compared to \$459.07 per week) for the period from

⁹ *Copeland*, 24 Kan. App. 2d at 320.

¹⁰ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

¹¹ *Id.* at Syl. ¶ 4.

September 21, 2005, through March 31, 2006, when the wage loss increases to 63 percent (\$216 per week compared to \$577.83 per week).¹²

Dr. Murati's task loss opinion is uncontradicted. Accordingly, for purposes of the permanent partial general disability formula claimant has an 82 percent task loss.

Averaging claimant's wage loss percentages with her task loss percentage creates a 68 percent permanent partial general disability from September 21, 2005, through March 31, 2006, followed by a 73 percent permanent partial general disability. Although our numbers slightly differ from those of the Judge, under the Act's method of computing disability benefits the Award remains the same.

The Board adopts the Judge's findings and conclusions that are not inconsistent with the above, including the finding that claimant sustained a 10 percent whole person functional impairment due to the June 2004 accident at work.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the May 16, 2007, Award to reduce claimant's wage loss. The ultimate disability compensation awarded, however, remains the same.

Connie A. Watts is granted compensation from USD 259 for a June 22, 2004, accident and resulting disability. Ms. Watts is entitled to receive the following disability benefits:

Based upon an average weekly wage of \$459.07, Ms. Watts is entitled to receive 48.71 weeks of temporary total disability benefits at \$306.06 per week, or \$14,908.18.

For the period ending September 20, 2005, based upon an average weekly wage of \$459.07, Ms. Watts is entitled to receive 16.29 weeks of permanent partial general disability benefits at \$306.06 per week, or \$4,985.72, for a 10 percent permanent partial general disability.

¹² As noted on page 4 of the findings, claimant's average weekly wage was \$459.07 through March 31, 2006, when it increased to \$577.83.

¹³ K.S.A. 2006 Supp. 44-555c(k).

For the period from September 21, 2005, through March 31, 2006, based upon an average weekly wage of \$459.07, Ms. Watts is entitled to receive 27.43 weeks of permanent partial general disability benefits at \$306.06 per week, or \$8,395.23, for a 68 percent permanent partial general disability.

For the period commencing April 1, 2006, based upon an average weekly wage of \$577.83, Ms. Watts is entitled to receive 186.15 weeks of permanent partial general disability benefits at \$385.24 per week, or \$71,710.87, for a 73 percent permanent partial general disability. The total award is not to exceed \$100,000.

As of December 28, 2007, Ms. Watts is entitled to receive 48.71 weeks of temporary total disability compensation at \$306.06 per week in the sum of \$14,908.18, plus 43.72 weeks of permanent partial general disability compensation at \$306.06 per week in the sum of \$13,380.94, plus 91 weeks of permanent partial general disability compensation at \$385.24 per week in the sum of \$35,056.84, for a total due and owing of \$63,345.96, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$36,654.04 shall be paid at \$385.24 per week until paid or until further order of the Director.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONNIE A. WATTS

DOCKET NO. 1,022,033

c: Joseph Seiwert, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent
John D. Clark, Administrative Law Judge